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U.S. Citizenship
and Immigration
Services

BS

FILE: EAC 04 022 51547 Office: VERMONT SERVICE CENTER

Date: 007 04 2005

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maia Johnson

& Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time of filing, the petitioner was a doctoral student at the Massachusetts Institute of Technology (MIT). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel describes the petitioner’s work:

[The petitioner] is leading research at Harvard University-MIT related to orthostatic intolerance among astronauts who have spent prolonged periods of time in space. This research is practically important for the nation’s goal to be at the forefront of space exploration. It is also significant for our general understanding of syncope in the general population.

Counsel observes that labor certification is not an option for the petitioner, because she is a graduate student with no offer of permanent employment. The unavailability of labor certification is not, by itself, grounds for a waiver. The waiver must be in the national interest, rather than merely the convenience of the alien seeking benefits. We note that the petitioner’s inability to obtain permanent employment is only a temporary one, while she remains a student or early-stage trainee. The fact that the petitioner could not obtain a labor certification *yet*, as of the filing date, does not establish that it is in the national interest to give the beneficiary immigration benefits at the soonest opportunity, before she is eligible for permanent employment in her field. Furthermore, if the petitioner’s current work is inherently temporary, then the petitioner bears the burden of explaining why this temporary work merits permanent immigration benefits. Her valid nonimmigrant status already permits her to carry on her short-term projects.

Counsel asserts that the petitioner “has made significant contributions to her field of endeavor,” as shown by “independent expert evaluations of [the petitioner’s] accomplishments, contributions, and reputation.” The first of six letters is from Professor [REDACTED] of the Harvard University-MIT Division of Health

Sciences and Technology. Professor [REDACTED] identifies himself as “the Team Leader of the Cardiovascular Alterations Team of the National Space Biomedical Research Institute which is the national agency that NASA has designated to develop countermeasures for the adverse effects of space flight on human health.” He states:

[The petitioner] has conducted advanced research in the field of cardiovascular health (pertaining to earth-bound patients and astronauts returning from space missions) for a number of years, and is well recognized by other experts for her contributions to this and related fields. . . .

In her current work, [the petitioner] is leading research aimed at better understanding the human cardiovascular system. In particular, [the petitioner] is pursuing cardiovascular system identification during simulated microgravity, and examining mechanisms of orthostatic intolerance following long-term space missions. Orthostatic intolerance is a failure to maintain an upright posture due to inadequate blood supply to the brain. It often occurs in astronauts returning to the Earth after prolonged space flight, when their blood pressure drops significantly upon standing and, as a result, syncope/fainting occurs. . . .

However, the basic mechanism of orthostatic intolerance remains unclear. . . . This is due to the lack of effective measurement techniques for this mechanism. [The petitioner’s] research contributed significantly to the understanding of this problem. She developed a new, accurate, non-invasive approach to quantify the functioning of human autonomic nervous system. . . . Using this new method, [the petitioner] demonstrated that the autonomic nervous system was down-regulated after prolonged head-down tilt bed rest – an accepted ground-based simulation of the microgravity condition in space. She also proved that the diminished sympathetic tone . . . is a major factor causing orthostatic intolerance. . . . These findings can be viewed as milestones in the research of cardiovascular orthostatic intolerance and they shine lights on solutions for this long-existing problem. . . .

In addition, [the petitioner] has been studying other aspects of the cardiovascular system after microgravity exposure, such as cardiac arrhythmia risk evaluation using a technique we developed called Microvolt T-Wave Alternans (MTWA). She is also studying the leg compliance changes and their correlation to orthostatic intolerance using her newly developed model-based method. Significantly promising results have been reached. . . .

At the same time, [the petitioner] has begun work on another project for the United States Department of Defense. The United States Army is fielding a Land Warrior system for remote triage of combat casualties. . . . One of several objectives of these systems must be to determine whether a soldier is going into shock due to hemorrhage. . . . [I]t would be desirable to monitor CO [cardiac output] rather than ABP [arterial blood pressure] in order to obtain an early indication of shock. . . .

An ideal CO measurement technique for remote triage (or clinical use) would operate autonomously and would be noninvasive (or minimally invasive), continuous, very accurate, and inexpensive. . . . [The petitioner] is developing a technique for continuous monitoring of CO by analysis of one ABP signal which can be easily measured non-invasively. . . . [The petitioner] has reached excellent preliminary results demonstrating a great promise of this technique.

Dr. [REDACTED] director of the National Space Biomedical Research Institute, formerly director of the Neural Systems Group at the Massachusetts General Hospital and the Harvard-MIT Division of Health Sciences and Technology, states that he was "greatly impressed by the results [the petitioner] presented" at a professional conference, and that the petitioner "has risen to the top echelon of her profession." Dr. [REDACTED] does not discuss the petitioner's work in any detail.

Dr. [REDACTED] director of the Cardiovascular Laboratory at the NASA Lyndon B. Johnson Space Center, states:

I have worked with Dr. [REDACTED] for several years. . . .

[The petitioner's] area of research focus in Dr. [REDACTED] laboratory is cardiovascular alternations introduced by microgravity exposure. To my knowledge, [the petitioner] has developed a novel method to quantify the human autonomic function. . . . Using this approach, [the petitioner] has reached a number of significant conclusions about the relationship between changes in autonomic tone and symptoms of syncope after microgravity exposure.

Dr. [REDACTED] an assistant professor at Michigan State University, states: "I met [the petitioner] in January 2001 when I was a post-doctoral fellow at MIT. At this time, [the petitioner] was getting ready to continue where I left off in my dissertation. I have been closely working with her ever since." Regarding the petitioner's method of collecting data through bed rest as a simulation of microgravity, Dr. [REDACTED] states that the petitioner "found that she could predict which subjects would pass a standing test following prolonged bedrest *before the subjects were bed-ridden*. The implication of this result is profound, because it suggests that countermeasures . . . can be given only to those astronauts who require them prior to their re-entry from space. Her technique can be the solution to a problem that has plagued the human space program for over 30 years." Dr. [REDACTED] states that the petitioner's other project, for the Department of Defense, "may revolutionize the clinical measurement of cardiac output, which up to now has proven to be unsatisfactory."

Dr. [REDACTED] director of Cardiac Electrophysiology at Harvard University's Mount Auburn Hospital, states:

I got to know [the petitioner's] research accomplishments for the first time when she took an elective with me last year, during which she attended rounds with me and was present during procedures I performed on patients. . . .

I am very impressed with [the petitioner's] accomplishments in the field of cardiovascular system research. . . . [The petitioner's] body of scholarship has garnered her an international recognition.

The final letter is from Dr. [REDACTED] assistant professor and director of the Syncope Center and Non-invasive Electrophysiology Laboratories at Columbia University. He states that he and the petitioner "started collaborating on a study of syncope/fainting related to microgravity exposure two years ago. . . . Her work has already demonstrated promising results." Dr. [REDACTED] describes the petitioner as "an individual who has made, and will surely continue to make, important contributions to her field of specialization."

As shown above, the letters that counsel characterizes as "independent . . . evaluations" are mostly from the petitioner's own professors and collaborators.

The petitioner submits copies of her published articles, and abstracts of her conference presentations. Counsel states that the petition includes evidence that this published and presented work "has been regularly cite[d] by her peers." The record contains evidence of only two citations. One of these is a self-citation by the petitioner; the other is a self-citation by the petitioner's collaborator [REDACTED]. Even if these citations were independent, it is not clear how two citations over a span of three years can justifiably be called a pattern of regular citation.

The director denied the petition, acknowledging the intrinsic merit of the petitioner's work, but finding that the petitioner had not demonstrated national scope or justified a waiver. Medical and scientific research at major institutions is inherently national in scope, however, because the results are disseminated nationally (and internationally) through publications and conferences and because the findings of such research tend to apply universally rather than only locally. We therefore withdraw the director's finding that the petitioner's work lacks national scope.

The director was correct, however, in noting that grant funding from NASA or other federal agencies does not automatically warrant a national interest waiver for the alien conducting the funded research. The director also concluded, from the petitioner's minimal citation history and the sources of her witness letters, that the petitioner's work has attracted little notice outside her own circle of collaborators and professors.

On appeal, counsel protests that the director "improperly denied the Petition without first issuing a Request for Evidence or a Notice of Intent to Deny, without clear evidence of the Petitioner/Beneficiary's ineligibility," as required by 8 C.F.R. § 103.2(b)(8). The most expedient remedy for this deficiency is to give full consideration at the appellate stage to any materials that the petitioner would have submitted earlier in response to such a notice. Given that the petitioner, upon filing the appeal, indicated that there would be no future supplement to the appeal, we consider the record to be complete.

Counsel states "the stated bases for the Service Center's decision are contradicted by the evidence of record." The first claimed contradiction concerns the national scope of the petitioner's work, already addressed above. Counsel then asserts that the petitioner is "indispensable" and "one of the few young researchers in this field

who has the ability” to conduct the research in which she was engaged at the time of filing. If a permanent position exists in which to conduct this research, and there are indeed very few individuals qualified to fill that position, then labor certification would appear to be a viable option. Counsel, however, contends that the petitioner’s “position is not permanent. Therefore, a labor certification is not an option for MIT to retain her expertise.” Counsel fails to address the inherent contradiction in this statement. If the position is not permanent, then there is no reason to believe that MIT intends “to retain her expertise” in the long term. If MIT saw fit to offer the petitioner a permanent position, then labor certification would become an option. If MIT desires only to employ the beneficiary in the short term, on specific projects of limited duration, then nonimmigrant classifications such as F-1 and H-1B already exist for that purpose (as demonstrated by the petitioner’s own history of nonimmigrant research work at MIT). The assertion that labor certification is not available to students and postdoctoral researchers is a weak argument for a national interest waiver.

The director had found that “all of the submitted letters . . . appear to be from individuals who have worked with the beneficiary or knew her from various academic settings where she pursued her education or conducted research.” Counsel states that this finding “is not accurate. The letter from Dr. [REDACTED] in NSBRI is NOT from an individual who has worked with the beneficiary or knew her from where she pursued her education or conducted research. As stated in the letter, they met at [a professional] conference . . . [that] is not in any way related to NSBRI or MIT.” Thus, counsel objects to the director’s finding, on the grounds that only five of the six witnesses have demonstrable connections to the petitioner, not “all of” them as the director stated. We note that the record contains Dr. [REDACTED] *curriculum vitae*, according to which Dr. [REDACTED] was at the Harvard/MIT Division of Health Sciences and Technology as an associate professor from 2000 to 2002, and a visiting professor from 2002 to 2003. Thus, Dr. [REDACTED] was on the faculty of the Harvard/MIT Division of Health Sciences and Technology for three years while the petitioner was a doctoral student at the same institution. His letter, therefore, is not strong evidence of a reputation outside of the Harvard/MIT Division of Health Sciences and Technology. We also note that Dr. [REDACTED] letter contains very little discussion of the petitioner’s actual work.

The next statement with which counsel takes issue is the director’s assertion that “[t]he record contains insufficient evidence that others have cited the beneficiary’s work to a degree that would be indicative of her claimed accomplishments in the field.” On appeal, counsel states: “The paper that is most relevant to the research . . . mentioned in the notice of denial . . . was accepted and published online (Sept. 26, 2003) a month before the I-140 petition was filed (Oct. 27, 2003). The hard copy of the paper was still in press. There was no time for any citations to appear in any peer-reviewed journals.” Counsel also explains that experiments of the type conducted by the petitioner sometimes take years to complete, and therefore citations of the petitioner’s work would take years to surface. Counsel fails to explain why this contradicts the director’s finding of “insufficient evidence that others have cited the beneficiary’s work.” If, as counsel stipulates, the petitioner’s “most relevant” article had never been cited as of the date of the denial, then obviously the record could not possibly have contained any citations of that article.

Thus, counsel’s assertion that the admitted *absence* of citations “contradicts” the director’s finding of “insufficient evidence” of citations defies logic. This is a particularly relevant finding because, in the initial filing, counsel had not claimed that the petitioner has produced important work that was too new to be cited. Rather, as noted above, counsel had previously claimed that the record contains “[e]vidence that the proposed

beneficiary's research has been discussed in the work of other researchers, and has been regularly cite[d] by her peers." The director correctly demonstrated the inaccuracy of counsel's initial claim, and counsel's *post hoc* arguments on appeal only emphasizes that inaccuracy.

Having abandoned the assertion that the petitioner's work is "regularly cited," counsel now claims on appeal that the petitioner's "work has attracted great attention of other researchers." Given that counsel's prior claim has collapsed due to lack of evidence, we must give this new claim equal scrutiny. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner submits copies of several electronic mail messages. Counsel refers to these messages as "requesting reprints of the beneficiary's papers published before the I-140 petition was filed." An evidence list accompanying the appeal includes "Email from [REDACTED] requesting reprints of papers" and "Email from [REDACTED] (forwarded by [REDACTED] requesting reprints of papers." [REDACTED] (also spelled "Pandey" in the message) requests a copy of one of the petitioner's articles, and copy of [REDACTED] doctoral thesis. [REDACTED] was also a co-author of the requested paper.)

The message from [REDACTED] intended for [REDACTED] was inadvertently addressed to [REDACTED] who forwarded the message to the petitioner. Dr. [REDACTED] requests copies of four papers, three of which were published before the petitioner began studying at MIT. The remaining paper is the September 2003 paper that counsel deems to be "most relevant," as discussed above. Both of these messages include requests for the petitioner's work and the work of others. The requests appear to be based on subject matter rather than authorship. The record does not indicate whether it is rare or common for one researcher to request copies of another's work, and there is nothing to show that a request for a copy is a sure sign of a future citation. Indeed, we might conclude that the requestors are unfamiliar with the contents of the articles, and had to request copies in order to determine whether or not the information therein would be of value to their own research. In any event, the fact that researchers have requested copies of six articles and theses, only two of which were co-authored by the petitioner, does not strongly indicate that the requestors consider the petitioner to be an especially significant researcher in the field. The two requests do not translate into evidence of heavy demand for the petitioner's work.

There are two other email messages in the record. One, from Dr. [REDACTED] of the Cleveland Clinic Foundation, requests "status of your bedrest studies. We would like to get additional data (echo exams)." The other message, from Om Kapoor of Columbia Presbyterian Hospital, requests assistance because "I am having trouble converting data from Ponemah to MEA files." As with the reprint requests, we cannot determine from the content of these messages whether they are anything beyond routine professional courtesies. Counsel's claims about the significance of the messages are not dispositive.

In sum, the record does not demonstrate that the petitioner has established a consistent track record of significant achievements with substantial impact on her field. Instead, the waiver request rests entirely on two projects that the petitioner undertook as a doctoral student, and is (apparently) continuing in a postdoctoral capacity. While MIT's faculty and the petitioner's collaborators are impressed with the results she has achieved, there is no evidence that MIT's interest in the petitioner extends beyond her involvement in these

specific projects, on which she is already authorized to work, first as an F-1 student and now under an H-1B petition filed and approved in February 2005. The available evidence suggests that the petitioner is conducting research in an important area of inquiry, and that her collaborators find this work to be promising, but it is in many ways too soon to determine the importance of the petitioner's contributions to that area. The petitioner's waiver request appears to be premature at best. Exaggerations and omissions in counsel's arguments significantly undermine the strength of those arguments.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.